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EXAMINER
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MAI, LANNA

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* SIMON KNOWLES

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Appeal 2009-004940  
Application 10/517,523  
Technology Center 3600

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Decided: March 9, 2010

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Before: LINDA E. HORNER, STEVEN D.A. MCCARTHY, and  
MICHAEL W. O'NEILL, *Administrative Patent Judges*.

HORNER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Simon Knowles (Appellant) seeks our review under 35 U.S.C. § 134 (2006) of the Examiner's decision rejecting claims 28-37, which are all of the claims on appeal. We have jurisdiction under 35 U.S.C. § 6(b) (2006).

## SUMMARY OF DECISION

We AFFIRM-IN-PART and ENTER A NEW GROUND OF REJECTION PURSUANT TO OUR AUTHORITY UNDER 37 C.F.R. § 41.50(b).

## THE INVENTION

Appellant's claimed invention is a collapsible bar. Spec. 1:3. Claims 28 and 29, reproduced below, are representative of the subject matter on appeal.

28. A collapsible bar comprising
- support members and
  - means for releasably latching work surface elements to the support members,
  - wherein there is a selectable number of the support members, the number of support members being variable from two to any number,
  - wherein a plurality of selectable and interchangeable work surface elements having different functions are provided,
  - each selected said work surface element being removably engagable with the support members via the releasable latching means, so that, when assembled, the said selected work surface elements interconnect the support members, and
  - wherein at least one of the work surface elements includes one of a recess and an aperture through the work surface element, the said recess being suitable for use as at least one of a multi-bottle holder and an ice-chest, and the aperture being suitable for at least one of receiving and supporting a waste container therein and receiving a waste chute leading to a waste container.

29. A collapsible bar as claimed in claim 28, wherein the releasable latching means includes an elongate channel on each support member and two skirt portions on a said surface element, the skirt portions being receivable in the channels as a close fit.

#### THE EVIDENCE

The Examiner relies upon the following evidence:

Donavan	US 1,093,119	Apr. 14, 1914
Baker	US 1,411,260	Apr. 4, 1922
Bartlett	US 3,498,239	Mar. 3, 1970
Koski	US 3,532,403	Oct. 6, 1970
Okopny	US 4,699,067	Oct. 13, 1987
Grandin	US 6,684,576 B2	Feb. 3, 2004

#### THE REJECTIONS

Appellant seeks review of the following rejections by the Examiner:

1. Rejection of claims 28, 33, and 35 under 35 U.S.C. § 103(a) as unpatentable over Grandin and Koski.
2. Rejection of claims 29 and 32 under 35 U.S.C. § 103(a) as unpatentable over Grandin, Koski, and Baker.
3. Rejection of claims 30 and 31 under 35 U.S.C. § 103(a) as unpatentable over Grandin, Koski, Baker, and Bartlett.
4. Rejection of claim 34 under 35 U.S.C. § 103(a) as unpatentable over Grandin, Koski, and Okopny.
5. Rejection of claims 36 and 37 under 35 U.S.C. § 103(a) as unpatentable over Grandin, Koski, and Donovan.

#### ISSUES

The Examiner's rejection of claims 28, 33, and 35 as unpatentable over Grandin and Koski is based on the claim construction that the limitation of "means for releasably latching work surface elements to the support

members” does not invoke 35 U.S.C. § 112, sixth paragraph analysis because claim 28<sup>1</sup> recites sufficient structure for achieving the specified function. Ans. 9 (citing to lines 8-10 of claim 28). Based on this claim construction, the Examiner found that Grandin discloses the claimed releasable latching means.

Appellant contends that Grandin does not disclose the releasable latching means of claim 28.

The issue before us is:

Should the limitation of claim 28 of “means for releasably latching work surface elements to the support members” be construed to cover the “corresponding structure, material, or acts described in the specification and equivalents thereof” as required by 35 U.S.C. § 112, sixth paragraph?

The Examiner concluded claims 29 and 32 were obvious in view of Grandin, Koski, and Baker based in part on the finding that Baker discloses a collapsible structure having elongate channels on the support members and skirt portions on the surface elements that are received in the elongate channels in a close fit. Ans. 5. The Examiner concluded it would have been obvious to modify the proposed combination of Grandin and Koski to include the channels and skirts disclosed by Baker for the purpose of allowing the structure to be securely assembled without bolts. Ans. 5.

Appellant argues claims 29 and 32 as a group. App. Br. 8-10. We select claim 29 as the representative claim, and claim 32 stands or falls with claim 29. 37 C.F.R. § 41.37(c)(1)(vii) (2009). Appellant contends that Baker’s skirt portions and channels do not have the “close fit” recited in claim 29. App. Br. 9. Appellant further contends a person of ordinary skill

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<sup>1</sup> Claims 33 and 35 depend from claim 28.

in the art would not have considered Baker because Baker discloses a shelving unit intended to be assembled and left in a static condition wherein the surfaces are the same and a loose connection is acceptable, while in contrast the claimed device utilizes various interchangeable work surfaces for a modular bar where a close fit is important. App. Br. 9-10.

The issues before us are:

Are Baker's skirt portions received within the channels in a "close fit" as recited in claim 29?

Is the rationale for the proposed combination used for the rejection of claim 29 sufficient?

The Examiner concluded claims 30 and 31 were obvious in view of Grandin, Koski, Baker, and based, in part, on the finding that Bartlett discloses an open-ended channel, and a latch element which can slidably receive the open-ended edge of the channel. Ans. 6.

Appellant argues claims 30 and 31 as a group. App. Br. 10-11. We select claim 30 as the representative claim, and claim 31 stands or falls with claim 30. 37 C.F.R. § 41.37(c)(1)(vii). Appellant contends a person of ordinary skill in the art would not use Bartlett's teachings to modify a channel that receives a skirt portion as a close fit because Bartlett's channels 26 are "nothing like the claimed channels." App. Br. 10-11.

The issue before us is:

Is the rationale for the proposed combination used for the rejection of claim 30 sufficient?

#### FINDINGS OF FACT

We find that the following enumerated facts are supported by at least a preponderance of the evidence. *Ethicon, Inc. v. Quigg*, 849 F.2d 1422,

1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Office).

1. Appellant admits that Baker's shelving is designed to be "quickly and easily assembled and disassembled." App. Br. 9.
2. Appellant's Specification describes the need for a stable, temporary structure to serve drinks and snacks. Spec. 1:5-8.
3. Appellant's Specification does not provide a lexicographic definition of the term "close fit," as used in claim 29. Spec. *passim*.
4. The word "close" is commonly understood to mean "having little or no space between elements or parts; tight and compact: a close weave." The American Heritage Dictionary (2d College ed. 1982) ("close," definition 4).
5. Appellant's Specification describes elongate channels 36 as dimensioned to receive side skirt portions 38 of surface elements 14 as "close fits." Spec. 5, 22-23; fig. 4.
6. Appellant concedes Baker's shelves 4 include skirt portions 17 that are receivable in channels 16. App. Br. 9 (see Figure 5 of Baker).
7. Baker discloses rack shelving for storing materials that "withstand the stresses and strains of use without special bracing means," and may be assembled without the use of bolts or special fastening means, "so that they may be knocked down for shipment and readily reassembled." Baker 1:9-18.
8. Baker discloses rack shelving comprised of shelf plates 4 supported on a framework of upright posts or columns 1 joined by horizontal longitudinal bars 2 extending between posts 1 from left

to right of the shelving unit, and horizontal transverse bars 3 extending between posts 1 at the front to the back of the shelving unit. Baker 1:55-60, figs. 1, 2.

9. Baker discloses that each transverse bar 3 includes side flanges 12 having a middle portion 15 bent upward to form a narrow channel 16 for receiving the downturned flanges 17 on the end of shelf plates 4. Baker 1:81-95; figs. 2, 5, 6.
10. Baker depicts downturned flange 17 fitting into narrow channel 16 so that the elements are adjacent. Baker figs. 1, 2, and 6.
11. Baker discloses that the construction and arrangement of the rack shelving rigidly interlocks the frame members. Baker 2:21-44.
12. Bartlett discloses metal shelving including a frame structure that supports one or more shelves 8 on brackets 6 that engage slots 18 in the frame wall 4. Bartlett, col. 1, ll. 12-14; col. 2, ll. 50-52, 57-61; figs. 1-3. Shelves 8 include a downwardly extending flange 10 having a tab 36 formed by laterally extending slot 40 and downwardly opening slot 38. Bartlett, col. 3, ll. 17-21; fig. 2. When installed, tab 36 of shelf 8 fits into slot 26 of brackets 6 “to restrain inadvertent lateral movement of the shelves relative to the brackets.” Bartlett, col. 1, ll. 14-17; *see also* col. 3, ll. 21-25; figs. 1-3.

## ANALYSIS

*Rejection of claims 28, 33, and 35 under 35 U.S.C. § 103(a) as unpatentable over Grandin and Koski*

Independent claim 28 is directed to a collapsible bar that comprises support members and “means” for releasably latching work surface elements to the support members. When a claim, such as claim 28, uses the term



“means” to describe a limitation, a presumption inheres that the inventor used the term to invoke 35 U.S.C. § 112, sixth paragraph. *Altiris Inc. v. Symantec Corp.*, 318 F.3d 1363, 1375 (Fed. Cir. 2003).

“This presumption can be rebutted when the claim, in addition to the functional language, recites structure sufficient to perform the claimed function in its entirety.” *Id.* However, such is not the case with claim 28. The releasable latching means of claim 28 are described in terms of function: the releasable latching means must permit the work surface elements to removably engage the support members, and, once the collapsible bar is assembled, the releasable latching means must interconnect the work surface elements and support members. Even if this interconnection can be viewed as reciting structure to some degree, it is not “sufficient [structure] to perform the claimed function in its entirety.” Claim 28 does not recite sufficient structure for the releasable latching means, and thus should be construed under the mandate of 35 U.S.C. § 112, sixth paragraph. *See In re Donaldson*, 16 F.3d 1189, 1194-95 (Fed. Cir. 1994) (en banc) (“[T]he ‘broadest reasonable interpretation’ that an examiner may give means-plus-function language is that statutorily mandated in paragraph six.”)

Because the Examiner did not properly interpret the “means for releasably latching” element of claim 28 under 35 U.S.C. § 112, sixth paragraph, and did not make the findings necessary to show that the combined teachings of Grandin and Koski would render obvious the releasable latching means under the proper interpretation of that element of claim 28, we cannot sustain the Examiner’s rejection of claim 28 under

§ 103. Claims 33 and 35 are also reversed by virtue of their dependence from claim 28.

*Rejection of claims 29 and 32 under 35 U.S.C. § 103(a) as unpatentable over Grandin, Koski, and Baker*

Claim 29 depends from claim 28, and includes the limitation that the skirt portions are received in the channels as a “close fit.” Appellant’s Specification does not define a “close fit,” but rather echoes that the elongate channels 36 are dimensioned to receive the side skirt portions 38 as a close fit (Fact 5). “Close” is ordinarily understood to mean “having little or no space between elements or parts” (Fact 4). Thus, one having ordinary skill in the art would understand claim 29 to require the skirt portions to be received in the channels so that there is little or no space between the two elements.

Appellant concedes that Baker discloses skirt portions receivable in channels as claimed (Fact 6), except that Appellant contends the fit is not a “close fit” as required by claim 29. App. Br. 8-10. We disagree.

Baker depicts the skirt portions received in the channels so that the elements are adjacent (Facts 7-10). Further, Baker’s disclosure that the device is designed to withstand the stresses and strains of use without special bracing means, and that the construction and arrangement of the device rigidly interlocks each frame joint, suggests the skirt portions fit tightly into the flanges (Facts 7, 11). We find Baker’s skirt portions are received in the channels so that there is little or no space between the two elements as required by claim 29.

Appellant’s attack on the rationale for the proposed combination unfairly characterizes Baker’s disclosure. Contrary to Appellant’s contention, Baker does not disclose that the shelving unit is intended to be

assembled and left in a static condition; rather, Baker discloses that the shelves may be disassembled, moved and reassembled (Fact 7). Appellant acknowledges as much by admitting that Baker's shelving is designed to be "quickly and easily assembled and disassembled" (Fact 1). Also contrary to Appellant's contention, Baker does not disclose a loose connection is acceptable, but rather depicts the skirt portions received in the channels so that the elements are adjacent (Fact 10). A more accurate characterization of Baker is that Baker, like Appellant, discloses a stable, temporary structure (Facts 2, 7).

Further, Appellant's attack on the Examiner's rationale for the proposed combination does not directly address the rationale provided by the Examiner (Ans. 6), namely, that one having ordinary skill in the art would have used the channel and skirt of Baker to allow the structure to be securely assembled without requiring the use of bolts. The Examiner's rationale is reasonable given that Baker discloses a structure that withstands the stresses and strains of use, and may be disassembled and reassembled without the use of bolts or special fastening means (Fact 7). Given that Appellant's argument is premised on a mischaracterization of the reference, and given Appellant's failure to address the reasonable rationale provided by the Examiner, we are unpersuaded by Appellant's argument.

Appellant has failed to identify error in the rejection of claim 29.  
Claim 32 falls with claim 29.

*Rejection of claims 30 and 31 under 35 U.S.C. § 103(a) as unpatentable over Grandin, Koski, Baker, and Bartlett*

Claim 30 depends from claim 29, which depends in turn from independent claim 28. Claim 30 adds the limitation that the channel is open-

ended, and the releasable latching means includes a latch element which can slidably receive the open-ended edge of the channel.

Appellant's contention that Bartlett's channels are "nothing like" the channels of claim 30 is to some extent an unconvincing individual attack, as the proposed combination uses the channels of Baker, not Bartlett. *See In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986); *In re Keller*, 642 F.2d 413, 426 (CCPA 1981) (One cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references). See also Ans. 6. In other words, the proposed combination recognizes Bartlett's channels are unlike the claimed channels because the proposed combination uses Baker's channels.

Further, Appellant does not address the rationale provided by the Examiner for the proposed combination, namely, for the purpose of further securing the surface element to the support members. See App. Br. 10-11; Ans. 6. The Examiner's rationale seems reasonable given that Bartlett discloses a latch element that restrains inadvertent lateral movement of the components secured (Fact 12).

Appellant has failed to identify error in the rejection of claim 30.  
Claim 31 falls with claim 30.

*Rejection of claims 34 under 35 U.S.C. § 103(a) as unpatentable over Grandin, Koski, and Okopny; rejection of claims 36 and 37 under 35 U.S.C. § 103(a) as unpatentable over Grandin, Koski, and Donovan*

Claims 34, 36, and 37 depend, directly or indirectly, from claim 28. The rejections of claims 34, 36, and 37 rely upon Grandin for the disclosure of the releasable latching means. For the reasons explained in the analysis of the rejection of claim 28 as obvious in view of Grandin and Koski, *supra*, we reverse the rejections of claims 34, 36, and 37.

### NEW GROUND OF REJECTION

We enter the following new ground of rejection of claim 28 under 35 U.S.C. § 103(a) as unpatentable over Grandin, Koski, and Baker.<sup>2</sup>

Claim 29 depends from independent claim 28. The Examiner's rejection of claim 29 under 35 U.S.C. § 103(a) constitutes an implied obviousness rejection of corresponding independent claim 28. Because claim 29 includes all the limitations recited in claim 28, we conclude claim 28 "must have been obvious" since claim 29 was found to be obvious. *See Ormco v. Align Technology*, 498 F.3d 1307, 1319 (Fed. Cir. 2007) (when a dependent claim is "found to have been obvious . . . the broader claims . . . must also have been obvious").

### CONCLUSIONS

The limitation of claim 28 of "means for releasably latching work surface elements to the support members" should be construed to cover the "corresponding structure, material, or acts described in the specification and equivalents thereof" as required by 35 U.S.C. § 112, sixth paragraph.

Baker's skirt portions are received within the channels in a "close fit" as recited in claim 29.

The rationale for the proposed combination used for the rejection of claim 29 is sufficient.

The rationale for the proposed combination used for the rejection of claim 30 is sufficient.

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<sup>2</sup> No inference should be drawn from the failure to make a new ground of rejection for other claims. *See* 37 C.F.R. § 41.50(b). *See also* Manual of Patent Examining Procedure (MPEP), 8<sup>th</sup> ed., rev. July 2008, § 1213.02 ("Since the exercise of authority under 37 C.F.R. § 41.50(b) is discretionary, no inference should be drawn from a failure to exercise that discretion").

DECISION

We AFFIRM the Examiner's decision to reject claims 29-32.

We REVERSE the Examiner's decision to rejection claims 28 and 33-37.

We enter a NEW GROUND OF REJECTION of claim 28 under 35 U.S.C. § 103(a) as being unpatentable over Grandin, Koski, and Baker.

Regarding the affirmed rejection(s), 37 C.F.R. § 41.52(a)(1) provides "Appellant may file a single request for rehearing within two months from the date of the original decision of the Board."

In addition to affirming the Examiner's rejection(s) of one or more claims, this decision contains new grounds of rejection pursuant to 37 C.F.R. § 41.50(b) (2007). 37 C.F.R. § 41.50(b) provides "[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review."

37 C.F.R. § 41.50(b) also provides that Appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new grounds of rejection to avoid termination of the appeal as to the rejected claims:

(1) *Reopen prosecution.* Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the Examiner, in which event the proceeding will be remanded to the Examiner. . . .

(2) *Request rehearing.* Request that the proceeding be reheard under § 41.52 by the Board upon the same record. . . .

Should Appellant elect to prosecute further before the Examiner pursuant to 37 C.F.R. § 41.50(b)(1), in order to preserve the right to seek review under 35 U.S.C. §§ 141 or 145 with respect to the affirmed rejection,

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Application 10/517,523

the effective date of the affirmance is deferred until conclusion of the prosecution before the Examiner unless, as a mere incident to the limited prosecution, the affirmed rejection is overcome.

If Appellant elects prosecution before the Examiner and this does not result in allowance of the application, abandonment or a second appeal, this case should be returned to the Board of Patent Appeals and Interferences for final action on the affirmed rejection, including any timely request for rehearing thereof.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a) (1) (iv).

AFFIRMED-IN-PART; 37 C.F.R. § 41.50(b)

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